

## Is there a 'Conservative' counter-terrorism?

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# Is there a ‘Conservative’ Counter-Terrorism?

Lydia Morgan and Fiona de Londras<sup>1</sup>

Every government has its own impact on policy, but no government starts from a blank page. As was the case with the Labour governments that came before them, the Conservative and Conservative-led governments since 2010 have found themselves contending with security and counter-terrorism. In so doing they have, we will argue, largely extended three clear trends from the Labour governments that went before: a focus on prevention, an embrace of surveillance, and a manifestation of human rights scepticism in the counter-terrorism context.

While these trends are all extensions of Labour commitments, discernible from the 'state of play' in 2010, they are also themselves updated extensions of much of<sup>2</sup> the Conservative approach to countering violence in Northern Ireland.<sup>3</sup> Indeed, as we will show below, in terms of laws and policies there is no clear Conservative or Labour approach to countering terrorism; instead, the development of counter-terrorism law since 2001 reveals a marked convergence of views and approaches between Labour and the Conservatives and the emergence of counter-terrorism as a rare point of bipartisan agreement. The underpinning reasons for this apparent convergence and bipartisanship may well differ between the parties, but the effects in terms of law are not clearly distinguishable between them.

The implications of this, we argue, are that a reorientation of counter-terrorism law and policy in the UK towards rights and away from control requires more than party political change: when it comes to counter-terrorism, a change of government does not mean a change of governance. Instead, such a reorientation requires a radical rupturing of the current counter-terrorist consensus and a dispositional shift towards security, risk, and rights.

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<sup>2</sup> We do not consider the use of lethal force here, which was a substantial part of security operations in Northern Ireland. For a comprehensive account see Fionnuala ní Aoláin, *The Politics of Force: Conflict Management and State violence in Northern Ireland* (2000, Belfast; Blackstaff Press).

<sup>3</sup> For a broad account see the essays in James Dingley (ed), *Combating Terrorism in Northern Ireland* (2009, Abingdon; Routledge).

## Part I. Counter-Terrorism under New Labour 1997–2010

Tony Blair's Labour government came to power at a time when the primary focus of UK counter-terrorism was Northern Ireland. At that time, in 1997, the Peace Process was advancing, but by no means completed, and there was a panoply of exceptional powers and legislation, applying only to Northern Ireland, that constituted much of the UK's counter-terrorism law *corpus*. It is rather striking to think now that the word 'terrorism' appeared only once in the Labour Party's manifesto in 1997<sup>4</sup> and then in connection only with a commitment to the UK's full participation in NATO: international terrorism simply was not on the agenda, and terrorist violence in Northern Ireland seemed to be drawing to a close.

A key aim for Labour was the normalisation of existing counter-terrorism provisions and powers, and the creation instead of stable and generally applicable counter-terrorism law.<sup>5</sup> This was largely achieved with the Terrorism Act 2000, which was barely dry on its velum when the attacks of 11 September 2001 took place. However, in spite of having just introduced such a comprehensive piece of legislation, and having 'brought rights home'<sup>6</sup> in the Human Rights Act 1998, the Labour government's response to the attacks of 9/11 was to focus, not only on international military action and cooperative activity with the United States, but also on the development of a new legislative arsenal at home. The Government entered a derogation to Article 15 of the European Convention on Human Rights—the only Council of Europe state to do so in response to the attacks—and proceeded to introduce, at lightning quick speed,<sup>7</sup> the Anti-Terrorism, Crime and Security Act 2001. As will become clear throughout this section, this marked the start of a zealous New Labour approach to domestic counter-terrorism, which had as a key focus (i) prevention, (ii) surveillance, and (iii) human rights exceptionalism. In this the Blairites were hardly forging a new approach to counter-terrorism: rather, they

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<sup>4</sup> Labour Party, *New Labour because Britain Deserves Better* (1997).

<sup>5</sup> Secretary of State for Northern Ireland and Secretary of State for the Home Office, *Legislation against Terrorism: A Consultation Paper* (1998, London; HM Stationary Office).

<sup>6</sup> Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (1997, London; HM Stationary Office); Human Rights Act 1998.

<sup>7</sup> For analysis see Helen Fenwick, "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?" (2002) 65(5) *Modern Law Review* 724–762.

were largely continuing some well-documented trends from Northern Ireland, but in their new rights-soaked constitutional atmosphere, and in the absence of any apparent threat to the United Kingdom *per se*, this in itself was noteworthy, as was the tenaciousness and persistence of these commitments across the Blair and Brown governments.

### *Prevention*

The Blair government was hardly alone in identifying prevention as a core counter-terrorist goal: the EU's immediate response to the 9/11 attacks, for example, made prevention one its core goals,<sup>8</sup> and it also enjoyed a prominent place in UN Security Council Resolutions that closely followed the attacks.<sup>9</sup> However, at the domestic level of UK legislation and policy the commitment to prevention took on four particular forms that, as we will see in Part II, are still present—in one form or another—in contemporary UK counter-terrorism.

The first of these is prevention by means of deprivation of liberty, the underpinning theory being that by restricting the physical liberty of a suspected terrorist one undermines his ability to act on terroristic intentions. For the Blair government the starting point on this front was detention without charge or trial for non-UK citizen suspected terrorists, with appeals (to the extent that they could be so described) being heard in the Special Immigration Appeals Commission. This repressive detention regime was ultimately found incompatible with the Human Rights Act 1998 in the famous *Belmarsh* case,<sup>10</sup> and with the European Convention on Human Rights in *A v United Kingdom*,<sup>11</sup> but it importantly took a (failed) tactic from counter-terrorism in Northern Ireland (internment), adapted it to the post-9/11 UK-wide landscape (in the Anti-Terrorism, Crime and Security Act 2001), planting a seed in UK-wide law that, although now modified, has grown obstinate roots. Once the incompatibility of the detention without trial regime had been identified, the

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<sup>8</sup> Council of the European Union, *Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001* (Brussels: Council of the European Union, Document 12019/01, 2001) and subsequently the Council of the European Union, *Framework Decision of 13 June 2002 on combating terrorism* (Brussels: Council of the European Union, 2002/475/JHA, 2002)

<sup>9</sup> UN Security Council Resolution 1368; UN Security Council Resolution 1373; UN Security Council Resolution 1377

<sup>10</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56

<sup>11</sup> *A and Others v the United Kingdom*, (2009) [GC] ECHR 301, 3455/05

Labour government—rather than abandon its commitment to prevention through deprivation of liberty—adjusted its mechanism, replacing the ATCSA regime with control orders<sup>12</sup> and protracted periods of detention before charge, even trying (unsuccessfully) to extend that to an unprecedented 90 days of pre-charge detention.<sup>13</sup> These control orders were, in some ways, less repressive (they did not usually, for example, result in imprisonment *per se*) and in other ways more so (they infringed into the home, could restrict contact and association, and were applicable to everyone in the UK, not only non-citizens).<sup>14</sup>

A second preventative focus was on prevention through exclusion. Again, this was limited to non-UK citizens, and was a commitment, primarily manifested through policy rather than embedded in new counter-terrorism legislation, to the deportation of ‘foreign’ suspected terrorists, largely on the basis of a determination by the Home Secretary that deportation would be conducive to the public good.<sup>15</sup> This was in some ways connected with the ATCSA detention regime, that having been presented as a way to protect the public against terrorist threats posed by suspected terrorists who could not be deported because of the risk that they would be subjected to human rights abuses in their home or receiving state.<sup>16</sup> International human rights law imposes a general duty of *non-refoulement*,<sup>17</sup> and in the context of the European Convention on Human Rights there was an absolute obligation under Article 3 not to exclude anyone to a country where there was a real risk that their rights under Article 3 might be violated.<sup>18</sup> That obligation had existed for some years, and the Court had affirmed its applicability in the context of security-related deportation *Chahal v United Kingdom*.<sup>19</sup> This, however, was a rule that the Blair government thought needed to be adjusted in light of the ‘new’ threat posed by

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<sup>12</sup> Prevention of Terrorism Act 2005,

<sup>13</sup> Patrick Wintour, “After eight years in power Tony Blair hears a new word: defeat”, *The Guardian*, 10 November 2005.

<sup>14</sup> For an argument that *A and others v Secretary of State for the Home Department* [2004] UKHL 56 expanded rights-restrictions to all, rather than limiting restrictions on rights, see e.g. David Jenkins, “When good cases go bad: unintended consequences of rights-friendly judgments” in Fergal F Davis & Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (2014, Cambridge; CUP), 75.

<sup>15</sup> s. 3(5)(6), Immigration Act 1971.

<sup>16</sup> See the arguments of the United Kingdom in *A v United Kingdom*, above n. 11.

<sup>17</sup> For a thorough account see, e.g., Jean Allain, “The *Jus cogens* nature of *non-refoulement*” (2001) 13(4) *International Journal of Refugee Law* 533-558.

<sup>18</sup> *Chahal v United Kingdom* (1996) 23 EHRR 413; *Soering v United Kingdom* [1989] 11 EHRR 439.

<sup>19</sup> *Chahal v United Kingdom* *ibid.*

‘radical Islamists’ such as Al Qaeda and associated forces. Rather quickly after the 9/11 attacks, the Prime Minister made it clear that he thought this rule needed revising, and a process of deporting suspected terrorists was commenced, often with some assurances as to human rights protection, but not necessarily assurances that were thought to fulfill the requirements of human rights law.<sup>20</sup> This was something of a departure: the context of counter-terrorism operations in Northern Ireland was such that deportation was not ordinarily a matter for consideration in policy terms, the suspects or culprits largely being UK citizens or, if not, Irish citizens. Now, however, the threat was perceived as external; as emanating from non-citizens, without a duty of allegiance to the Crown and state, and who could be externalised (and thus the materialisation of the threat hopefully averted) by simple removal of the perceived threat from the United Kingdom. This could be done without reaching the high threshold of proof required in a criminal trial.

While non-citizen suspected terrorists could be removed from the territory under the Blair government’s assessment, their ability to radicalise citizens was considered to be significant. Counter-radicalisation, and de-radicalisation, were placed center stage in the preventative turn, and it was the Blair government that introduced CONTEST in 2003.<sup>21</sup> Again, the UK was hardly alone in this: countering radicalisation is a central commitment at EU and international level as well,<sup>22</sup> and a whole industry in devising mechanisms of achieving this aim sprang up at home and abroad,<sup>23</sup> with significant resources committed to developing, implementing, and supporting programmes and approaches to counter-radicalisation. Such a development was also, of course, the subject of criticism, not least for its reliance on largely discredited ‘escalator theories’ of radicalisation,<sup>24</sup> but the policy commitment

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<sup>20</sup> See David Anderson (with Clive Walker), *Deportation with Assurances* (2017), Cm 9462, Chapter 1 for an account of the early attempts to resolve what Anderson therein calls “the *Chahal* dilemma”. Blair quickly adopted the position that the UK may withdraw from the ECHR or amend the Human Rights Act 1998 if memoranda of understanding to facilitate deportation of suspected terrorists were not accepted by courts: Ned Temko & Jamie Doward, “Revealed: Blair attack on human rights law”, *The Guardian*, 14 May 2006.

<sup>21</sup> Home Office, *Countering International Terrorism: The United Kingdom’s Strategy*, (Cm 6888, 2006)

<sup>22</sup> For a thorough analysis see Edwin Bakker, “EU Counter-radicalization Policies: A Comprehensive and Consistent Approach?” (2015) 30 *Intelligence and National Security* 281-305.

<sup>23</sup> For an analysis see Arun Kundnani, “Radicalisation: The Journey of a Concept” (2012) 54(2) *Race and Class* 3-25.

<sup>24</sup> See for example Joint Committee on Human Rights, *Counter-Extremism: Second Report of Session 2016-17* (2016). See also the Government’s response, rejecting this criticism: *Counter-Extremism: Government Response to the Committee’s Second Report of Session 2016-17* (2016), esp. p.p 7-8.

to reach beyond the criminal law and into every part of social life—faith communities, schools, the health service, neighbourhoods, sports clubs etc—in order to inculcate ‘British values’,<sup>25</sup> a commitment to which might make one resilient to the radicalising and glorifying speech of ‘extremists’ took deep root, largely implemented through the CONTEST policy.

CONTEST was intended to be a comprehensive, “pan-governmental”,<sup>26</sup> and “long-term strategy for countering international terrorism”.<sup>27</sup> Reflecting this, it has four axes: Pursue, Prevent, Protect and Prepare. *Pursue* largely describes the Government’s prosecutorial policy. *Prevent* focuses on identifying potential terrorist plots and utilizing broad intelligence and surveillance powers to detect and stop persons who might be ‘vulnerable’ to developing terrorist ‘sympathies’, including by “[e]ngaging in the battle of ideas—challenging the ideologies that extremists believe can justify the use of violence, primarily by helping Muslims who wish to dispute these ideas to do so”.<sup>28</sup> *Protect* seeks to minimize exposure and weakness to terror attacks by strengthening security, particularly at Borders and on the transport network. *Prepare* focuses on mitigating the impact of an attack. Although initially conceived by the Home Office in 2003 under David Blunkett,<sup>29</sup> the policy was only made public in 2006 under Charles Clarke<sup>30</sup> and following the July 7<sup>th</sup> 2005 attacks in Central London. At that time, the emphasis was shifted decisively to ‘prevent’, which was construed not only as a government activity but as “a battle of ideas in which success will depend upon all parts of the community challenging the ideological motivations used to justify the use of violence”.<sup>31</sup> Prevention, then, was construed not only as a key element of countering terrorism undertaken through law alone, but as a combination of legal and non-legal instruments aimed collectively at “addressing structural problems in the UK and elsewhere that may contribute to

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<sup>25</sup> See the proposal for the development of a Statement of British Values in the *Governance of Britain: Green Paper* (2007; Cabinet Office). For a critique see e.g. Orla Lynch, “British Muslim Youth: radicalisation, terrorism and the construction of the ‘other’” (2013) 6(2) *Critical Studies on Terrorism* 241–261; Carol Johnson, “The politics of affective citizenship: from Blair to Obama” (2010) 14 *Citizenship Studies* 495–509.

<sup>26</sup> Home Affairs Select Committee, *Project CONTEST: The Government’s Counter-Terrorism Strategy*, (HC 2008–2009, 212), 4.

<sup>27</sup> Home Office, *Countering International Terrorism: The United Kingdom’s Strategy*, (Cm 6888, 2006), 1.

<sup>28</sup> *Ibid*, 2.

<sup>29</sup> *Ibid*; see also John Gearson and Hugo Rosemont “CONTEST as Strategy: Reassessing Britain’s Counterterrorism Approach” (2015) 38(12) *Studies in Conflict & Terrorism* 1038–1064.

<sup>30</sup> Home Office, *Countering International Terrorism: The United Kingdom’s Strategy*, (Cm 6888, 2006).

<sup>31</sup> *Ibid*, 3.

radicalisation”.<sup>32</sup> Criminal offences (discussed further below) were intended to deter those who facilitate terrorism and targeted activities in prisons and other areas where a high risk of radicalisation is perceived to exist sought to challenge ideological motivations of extremists through work with and within communities, and through international activity and support for Muslim communities in order to “counter extremists’ false characterisation of the UK as...a place where Muslims are oppressed”.<sup>33</sup>

The ‘prevent’ strand of CONTEST illustrates the expansive approach to counter-terrorism promoted and implemented by the New Labour government; an approach that focused on prevention by all means, including but going well beyond the creation and implementation of legal instruments *per se*. The 2009 published version, colloquially known as ‘CONTEST 2,’<sup>34</sup> was more detailed, partly because it was seen as a Public Service Agreement (PSA) outlining targets to enable progress monitoring,<sup>35</sup> however its emphasis on PREVENT remained, as did the criticism of it, particularly because of its perceived targeting of Muslim communities.<sup>36</sup>

The fourth key strand to New Labour’s commitment to preventing terrorism was the creation and promulgation of preventative offences, intervening at a notably remote stage from any terrorist acts. This had begun prior to the attacks of 11 September 2001 in the Terrorism Act 2000. This Act, which was to act as comprehensive counter-terrorism legislation for the whole of the United Kingdom,<sup>37</sup> included the continuation of some broadly preventive approaches such as proscription,<sup>38</sup> and the criminalisation of membership of,<sup>39</sup> support for,<sup>40</sup> and the manifestation of support for a proscribed organisation through wearing or displaying uniform in public.<sup>41</sup> Proscribed organisations were expanded to include

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<sup>32</sup> Ibid, 11.

<sup>33</sup> Ibid, 16.

<sup>34</sup> Ibid.

<sup>35</sup> *National Security Strategy of the United Kingdom: Security in an Interdependent World*, Cm 7291, 2008

<sup>36</sup> Arun Kundani, *Spooked: How Not to Prevent Violent Extremism*, (2009, London; Institute of Race Relations); Home Affairs Select Committee, *Roots of Violent Radicalisation* (HC 2010–12, 1446); Imran Awan “I am a Muslim not an extremist’: How the Prevent strategy has constructed a ‘suspect’ community” (2012) 6 *Policy and Politics* 1158–1185.

<sup>37</sup> Although c.f. Part VII, Terrorism Act 2000, on Northern Ireland.

<sup>38</sup> Part II, Terrorism Act 2000 as originally enacted.

<sup>39</sup> s. 11, Terrorism Act 2000 as originally enacted.

<sup>40</sup> s. 12, Terrorism Act 2000 as originally enacted.

<sup>41</sup> s. 13, Terrorism Act 2000 as originally enacted.



international terrorist groups, such as Al Qaeda.<sup>42</sup> Criminal offences were expanded to include possession of “an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism”,<sup>43</sup> and the collection or making of “a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism”<sup>44</sup> or the possession of a document or record of that kind.<sup>45</sup> The Terrorism Act 2006 greatly expanded this preventive focus. This criminalised the direct or indirect encouragement of the commission, preparation or instigation of acts of terrorism,<sup>46</sup> the dissemination of terrorist publications,<sup>47</sup> and (to much criticism) the glorification of terrorism. The Act spread the net widely: for example, attendance at a place used for terrorism training if he knows or believes that training is being provided there or if a person attending there “could not reasonably have failed to understand” what was going on there.<sup>48</sup> It is no defence that the person in question was not receiving the instruction or training;<sup>49</sup> presence is sufficient to attract criminal liability. It also expanded the basis for proscribing organisation to include organisations that promote or encourage terrorism.

### *Surveillance*

A second dominant theme of the New Labour approach to counter-terrorism was an embrace of surveillance. Again, this predates the attacks of September 2001, but intensified following those attacks.

The Regulation of Investigatory Powers Act 2000 (RIPA) was the first comprehensive regulatory regime governing surveillance, the interception of communications and the decryption of encrypted material. Like the Terrorism Act 2000, it was part of the process of regularising counter-terrorism powers, including creating at least some form of oversight, to mark a transition from Northern Irish exceptionalism and towards the normalisation of counter-terrorism within the general legislative *acquis*. It replaced the heavily criticised Interception of

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<sup>42</sup> See also s. 21, Terrorism Act 2006 as originally enacted.

<sup>43</sup> s. 57, Terrorism Act 2000.

<sup>44</sup> s. 58(1)(a), Terrorism Act 2000.

<sup>45</sup> s. 58(1)(b), Terrorism Act 2000.

<sup>46</sup> s. 1, Terrorism Act 2006 as originally enacted.

<sup>47</sup> s. 2, Terrorism Act 2006 as originally enacted.

<sup>48</sup> s. 8, Terrorism Act 2006 as originally enacted.

<sup>49</sup> s. 8(3), Terrorism Act 2006 as originally enacted.

Communication Act 1985 (IOCA 1985). Before the IOCA 1985 most interception of communication had taken place using prerogative powers but following *Malone*<sup>50</sup> a more comprehensive framework was called for. RIPA was intended to ensure investigatory powers accords with Article 8 privacy rights as “[d]isproportionate, or unfettered, use of interception can have consequences” for individual rights.”<sup>51</sup>

RIPA regulated six types of investigatory power: the interception of communication; the acquisition of communications data; intrusive surveillance; directed covert surveillance (non-intrusive surveillance); the use of Covert Human Intelligence Sources (CHIS)<sup>52</sup>; and access to encrypted data. Described by a former Director of GCHQ David Omand as providing “full legislative coverage” in regards to rights,<sup>53</sup> the central motivation for new regulation was less about rights and more about the ability to compel access to the growing amount of digital encrypted material.<sup>54</sup> Omand has also suggested that RIPA “embodies the principles of proportionality through differing levels of request and approval” by carefully calibrating “intrusive operations with seniority.”<sup>55</sup> At the apex of the seniority chain is the Secretary of State and the Prime Minister, which means the responsibility for rights protection sits in same hands as those who are also responsible for counter-terrorism and security. For these reasons, others have been more critical of RIPA’s from a human rights perspective,<sup>56</sup> but in spite of that the trend since its passage has resolutely been towards more and more intensive surveillance rather than less.

The approach to surveillance accords with the preventative agenda. For example, surveillance originating from intercepted communications is not admissible in court,

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<sup>50</sup> *Malone v Metropolitan Police Commissioner* (no 2) [1979] Chancery Division 344

<sup>51</sup> Home Office, *Interception of Communications in the United Kingdom: A Consultation Paper*, (Cm 4368, 1999)

<sup>52</sup> Schedules 1 and 2, RIPA 2000

<sup>53</sup> David Omand, ‘Ethical Guidelines in using secret intelligence for public security’ in Andrew, Aldrich and Wark (eds) *Secret Intelligence: A Reader*, (2009, Abingdon; Routledge) 395–410, 402

<sup>54</sup> Bela Bonita Chatterjee, ‘New but not improved: a critical examination of revisions to the Regulation of Investigatory Powers Act 2000 encryption provisions’ (2011) 19(3) *International Journal of Law and Information Technology* 264–284, 264

<sup>55</sup> David Omand, ‘Ethical Guidelines in using secret intelligence for public security’ in Andrew, Aldrich and Wark (eds) *Secret Intelligence: A Reader*, (2009, Abingdon; Routledge) 395–410, 402

<sup>56</sup> Jemima Stratford, ‘Changes needed in the law’ in Moore (ed) *RIP RIPA? Snowden, Surveillance, and the Inadequacies of our Existing Legal Framework* [Record of Roundtable discussion], (2014) 85(2) *The Political Quarterly* 128–129; see also Hiral Bhatt ‘RIPA 2000: A human rights examination’ (2006) 10(3) *The International Journal of Human Rights* 285–314.

while other similar forms such as recordings from a concealed microphone are.<sup>57</sup> Whatever the background ethics of this kind of investigation measure, from a rights perspective the ban on intercept evidence repeats the damage done to privacy as substantial portions of an investigation will not be disclosed to the accused or, where the evidentiary threshold cannot be met, preventative measures are used instead. The basis of the ban is, apparently, the protection of operational methods,<sup>58</sup> but one outcome is that fewer prosecutions take place.<sup>59</sup>

Multiple reviews in the New Labour period (and continued in under the coalition, see more below) argued for the ban on intercepted evidence should be overturned.<sup>60</sup> Blair was not in favour, although Brown initiated a subsequent review in 2007/8.<sup>61</sup> The Privy Council Review led by Sir John Chilcot, outlined nine operational requirements which would enable the use of intercept evidence.<sup>62</sup> One required that intercept only be seen by cleared judges, prosecutors, or special (defence), which accounts for the growth in Closed Material Procedures (CMPs)<sup>63</sup> and employment of Public Interest Immunity (PII) certificates to protect the origin of and operational aspects of sensitive information.<sup>64</sup> CMPs were eventually contentiously extended to civil procedures Justice and Security Act 2013 in response to *Al Rawi*<sup>65</sup> when the Supreme Court ruled that CMPs could not be used in ordinary civil cases which resulted in the government settling with Binyam Mohammed and other ex-Guantanamo detainees who brought the claim.<sup>66</sup>

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<sup>57</sup> Between 2000 and 2016 the relevant provisions were s 17 RIPA 2000, repeating provisions from the s 9 Interception of Communications Act 1985.

<sup>58</sup> James Brokenshire, *Intercept as Evidence* (HC Deb 17 December 2014 124W)

<sup>59</sup> Silkie Carlo, *5 Reasons why we need intercept evidence in court*, (Liberty blog, 2016) (available at <https://www.liberty-human-rights.org.uk/news/blog/5-reasons-why-we-need-intercept-evidence-court> )

<sup>60</sup> See Annex C of HM Government, *Intercept as Evidence*, (Cm 8989, 2014)

<sup>61</sup> Stuart MacDonald 'Prosecuting Suspected Terrorists: Precursor Crimes, Intercept Evidence and the Priority of Security' in Stuart McDonald (ed), *Critical Perspectives on Counter-Terrorism*, (2015, Abingdon; Routledge) 130-149, 138.

<sup>62</sup> Privy Council, *Privy Council Review on Intercept as Evidence*, (Cm 7324, 2008) para 208, 49

<sup>63</sup> s. 40(2) and 40(5), Constitutional Reform Act 2005, as relied on in *Bank Mellat v Her Majesty's Treasury* (No. 1) [2013] UKSC 38; other counter-terrorism actions in respect of which CMPs can be used are outlined in Part 6 of the Counter-Terrorism Act 2008.

<sup>64</sup> Under part 1, s 18(7) RIPA 2000 (among other provisions).

<sup>65</sup> *Al Rawi and others v The Security Service and others* [2011] UKSC 34

<sup>66</sup> Adam Wagner, "Government 'pays out' Al Rawi mistreatment claimants", *UK Human Right Blog*, 16 November 2010 (available at <https://ukhumanrightsblog.com/2010/11/16/government-pays-out-al-rawi-mistreatment-claims/> )

Following the 2001 attacks, and those in Madrid (2004) and London (2005) the focus on surveillance intensified. In particular, there was considerable concern that the use by terrorists of mobile telecommunications devices was enabling the evasion of conventional surveillance mechanisms and “reaffirmed...the need to adopt common measures on the retention of telecommunications data as soon as possible”.<sup>67</sup> This was not a new concern: as Jones and Hayes have shown,<sup>68</sup> demands for such data retention on the international level can be traced back to at least 1993, when the very first Council of Justice and Home Affairs resulted in a Resolution of Ministers of Justice calling for research into the need for telecommunications interception in Europe.<sup>69</sup> Following a number of unsuccessful attempts to introduce a Framework Directive on data retention at EU level,<sup>70</sup> the 2005 London attacks resulted in the imposition by the Presidency of the EU Council—at that time held by the UK—of a deadline for the adoption of such a Directive and a ‘robust’ approach by the then Home Secretary, Charles Clarke, to ‘persuading’ the European Parliament to support the proposal,<sup>71</sup> which it ultimately did on 14 December 2005. The Data Retention Directive then passed into law in March 2006. Interestingly, the UK’s desire to pass EU-level data retention law followed a failed attempt to introduce mandatory data retention in domestic law. As part of the Anti-Terrorism Crime and Security Act 2001, the government had attempted to introduce mandatory data retention but was limited to the Home Secretary introducing a voluntary code of conduct for data retention, which was not adopted by many telecommunications providers.<sup>72</sup> The EU Data Retention Directive, then, remedied—in the eyes of the government—this failure in domestic law, requiring the retention by all telecommunications providers of metadata to be made available to law enforcement agencies investigating serious crime. As predicted by many NGOs at the time, the Court of Justice of the European Union ultimately stuck

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<sup>67</sup> Preamble, para 10, Directive 2006/24/EC (Data Retention Directive).

<sup>68</sup> Chris Jones and Ben Hayes, ‘The EU Data Retention Directive: A Case Study in the Legitimacy and Effectiveness of EU Counter-Terrorism Policy’ (2013, SECILE).

<sup>69</sup> Permanent Representatives Committee (Part 2), ‘Interception of telecommunications’, 10090/93, 16 November 1993, (available at <http://database.statewatch.org/e-library/1994-jha-k4-03-06.pdf>); held in the Statewatch European Monitoring and Documentation Centre (SEMDOC) JHA Archive, (available at <http://www.statewatch.org/semdoc/jha-archive.html> )

<sup>70</sup> See the analysis in Jones and Hayes, above n 68, p.p. 6-9.

<sup>71</sup> See the analysis in Jones and Hayes, *ibid*, at 9.

<sup>72</sup> Voluntary Code of Practice on Data Retention on 5 December 2003, Statutory Instrument 2003/3175.

down the Data Retention Directive<sup>73</sup> but, as we will see in Part II, its legacy remains in UK law.

### *Human Rights Exceptionalism*

In spite of having introduced the Human Rights Act in 1998, the New Labour government found its commitment to rights-protection challenged in the wake of the 2001 attacks. We have already seen that its commitment to prevention included, for example, the preventative detention and deportation of foreign suspected terrorists, and the introduction of extensive blanket surveillance through its efforts on the EU level. All of these approaches raised clear questions of human rights compliance, both at home and abroad. In respect of human rights ‘at home’ the Labour government’s starting point was to derogate from Article 5 of the European Convention on Human Rights and to claim that the measures introduced thereafter were within those “strictly required by the exigencies of the situation”<sup>74</sup> and so compliant with the Convention. A significant element in substantiating this claim was the proceduralisation of rights for suspected terrorists: rather than allow suspected terrorists detained under the 2001 Act to select their own lawyers and to be told of the case against them, the system of Special Advocates was introduced for such detainees through which lawyers with approved security clearance could be assigned to defendants, told the case against their client, and then be required to represent them which revealing to them no more than the ‘gist’ of the case against them. While on the face of it this raises clear questions of compliance with Article 6 of the European Convention on Human Rights it was, in fact, found to be sufficient to satisfy those rights, even after the UK’s derogation had been lifted. Similarly, control orders—which replaced detention under the Anti-Terrorism Crime and Security Act—were considered to be compliant with Article 5 *in principle*, although the terms of specific control orders were considered at times to go beyond what was permissible. In all such cases the key to a finding of human rights compliance was the existence of *procedural safeguards*, just as had been the case in respect of detention and investigation of suspected terrorists in Northern Ireland, notwithstanding the well-documented insufficiency of those safeguards from a practical perspective. In this, the Labour government clearly succeeded in its ‘internal challenge’ to human

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<sup>73</sup> *Digital Rights Ireland and Seitlinger v Minister for Communications, Marine and Natural Resources* (C-293/12 and C-594/12) [2014] E.C.R. I-238; [2014] 2 All E.R. (Comm) 1

<sup>74</sup> Article 15, European Convention on Human Rights.

rights law: not rejecting its application and significance, per se, but arguing that it required adjustment and high levels of tolerance for national counter-terrorism activity given the ‘new’ threat posed by ‘radical Islamist’ international terrorism. This form of human rights exceptionalism was in some ways subtle: there was no wholesale rejection of human rights law as “quaint” or inappropriate, but rather an effective attempt to reshape those human rights standards to create significant space for security action ‘at home’ even in the absence of a derogation under Article 15. Indeed, so complete was the European Court of Human Rights’ apparent acceptance of the thrust of this argument that it has even been characterised as having appeased the United Kingdom in its ‘War on Terrorism’ jurisprudence.

When it comes to activities outside of the UK, however, the Labour government’s approach was a full-frontal attack on the applicability of human rights law. This was evident in the UK’s (unsuccessful) attempt, through an intervention in *Saadi v Italy*,<sup>75</sup> to ensure the adjustment of the *Chahal* principle so that a deporting state could ‘balance’ the potential risk the proposed deportee was said to pose to the population against the deportee’s absolute right to be free from torture, inhuman and degrading treatment and punishment under Article 3.<sup>76</sup> It also became clear from the UK’s stringent attempts to resist the application of the European Convention on Human Rights to its military activities in Iraq in *Al-Jedda* and *Al-Skeini*, which concerned death and detention in Basra.<sup>77</sup> Before the European Court of Human Rights the UK argued that the European Convention on Human Rights should not apply to the activities of British troops in these cases first because they were acting under a UN Security Council mandate and thus “not exercising the sovereign authority of the United Kingdom”<sup>78</sup> and secondly because Basra was not “within the jurisdiction”<sup>79</sup> of the UK.<sup>80</sup> The Court’s finding that the Convention did in fact apply led to a backlash that, as we will see in Part II, continues to resonate today.

In the first nine years of the ‘War on Terrorism’, then, both the Blair and Brown governments committed to an approach to counter-terrorism that was focused on

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<sup>75</sup> *Saadi v Italy* (2008) [GC] ECHR 179 37201/06

<sup>76</sup> *Ibid.*

<sup>77</sup> *Al-Jedda v United Kingdom* (2009) [GC] ECHR 408 27021/08; *Al Skeini & Ors v United Kingdom* (2011) [GC] ECHR 1093 55721/07;

<sup>78</sup> *Ibid.*, [97].

<sup>79</sup> Article 1, European Convention on Human Rights.

<sup>80</sup> *Al Skeini*, above n 77, [101-102].

prevention, embraced surveillance as a key technique of counter-terrorism, and committed to constructing human rights as standards that could be fulfilled by proceduralism at home and resisted entirely abroad. In all of this, they had been supported by the Conservative Party in opposition, the rare points of Opposition and back bench resistance having been leveraged to prevent the extension of pre-trial detention to 90 days (as proposed by Brown) or to insist on procedural safeguards such as Special Advocates and sunset clauses for controversial provisions. It was this counter-terrorism *acquis*, then, that the Conservative-led government inherited in 2010.

## **Part II. THE CONSERVATIVE APPROACH TO COUNTER-TERRORISM 2010-2017**

Theresa May has been a key figure in the crafting and implementation of counter-terrorism since 2010, first as Home Secretary and latterly as Prime Minister. As Home Secretary one of her first actions was to order a comprehensive review of counter-terrorism laws and powers.<sup>81</sup> The review was wide-ranging, at least as far as domestic counter-terrorism law and policy was concerned. It considered pre-charge detention, stop and search powers, the use of RIPA, measures to deal with organisations promoting hatred and violence, control orders, and ‘deportation with assurances’. Following extensive consultation, the Review found that 28-day pre-charge detention, the indiscriminate use of terrorism stop and search powers, the use of RIPA by local authorities to investigate low-level offences, and control orders—all introduced by the previous Labour government—were “neither proportionate nor necessary”.<sup>82</sup> At the same time, however, the Review recommended that government develop and alternative to control orders, rationalise the legal bases for accessing communications data, and make “[a] stronger effort to deport foreign nationals involved in terrorist activities...fully respecting our human rights

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<sup>81</sup> Theresa May, *Counter-terrorism and Security Powers*, (HC Deb 13 July 2010 513(col 797)) as promised in the Coalition Agreement, *The Coalition: Our Programme for Government*, (May 2010) 24 (albeit a document which promised no fewer than 39 policy reviews) (available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78977/coalition\\_programme\\_for\\_government.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf))

<sup>82</sup> Ibid, 5.

obligations”.<sup>83</sup> Despite the rights-based orientation suggested by the review, then, the three key themes of prevention, surveillance, and exceptionalism prevailed.

Announcing the outcome of the review, Theresa May echoed the views of many critics of New Labour’s approach to counter-terrorism over the preceding decade, while nevertheless expressing her confidence in continuing bipartisan consensus on key commitments of UK counter-terrorism:

We reviewed counter-terrorism legislation because too much of it was excessive and unnecessary. At times it gave the impression of criminalising entire communities. Some measures – such as the extraordinary attempt to increase the period of pre-charge detention for terrorist suspects to 90 days – were rightly defeated in Parliament. Others, such as the most draconian aspects of control orders, were defeated in the courts.

These measures undermined public confidence. So I am delighted that the Leader of the Opposition has made clear that he will support me in preventing the excessive use of state power.<sup>84</sup>

In moving towards a reduction in this “excessive use of state power”, the Conservative-led government was acting in a notably changed climate to that in which Blair’s Labour had begun its counter-terrorism work in 1997 and following the 2001 attacks. Not only were they working within a context already determined by the New Labour approach as outlined in Part I, but they also had to deal with two particular legacies of the Labour era. The first was the Iraq Historic Allegations Team, established to determine claims of ill-treatment by British military activity in Iraq following the Strasbourg decisions in *Al-Skeini* and *Al-Jedda* discussed above. The Snowden revelations had made it clear the extent of unlawful surveillance led by the United States but undertaken with the assistance and complicity of the United Kingdom. Although neither of these related to the Conservatives’ actions in government, it was they that had to deal with the fallout from each of them, including increasing resistance to the IHAT and the backlash against surveillance powers following the Snowden revelations. Secondly, by the

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<sup>83</sup> Ibid, 6

<sup>84</sup> Theresa May, *Counter-Terrorism Review* (HC Deb 26 January 2011, 522 (col 306)).



time the Conservative-led government took over in 2010 the nature of terrorist threat had begun to change with the phenomena of Foreign Terrorist Fighters, online radicalisation, lone wolf actors, and the Islamic State/Daesh becoming increasingly prominent with associated variations in the forms and nature of terrorist activity that the government was required to confront. Thus, the Conservative-led and, later, Conservative governments introduced some variations to the legal and policy counter-terrorist environment inherited in 2010 but, in doing so, remained committed to prevention, surveillance, and human rights exceptionalism, creating a remarkable continuity across political constellations.

### *Prevention*

Like the Labour government before them, the Conservative-led and Conservative governments since 2010 have stressed the importance of preventing terrorism, not merely of responding when it arises. In this respect, however, there have been some differences in the Conservative approach, although notably the preventive offences introduced in the Terrorism Act 2000 and the Terrorism Act 2006, and discussed in Part I above, have not been revoked and continue to operate. Unlike the Labour government, which concentrated significant effort on empowering long periods of detention before trial, the Conservative focus has been more notably on the physical exclusion of suspected terrorists than on pre-trial detention *per se*. As part of the 2011 review it was decided that the period of pre-trial detention would revert to 14 days (from 28 days), although the government would be entitled to extend that to 28 days with parliamentary approval in the event of an emergency. Control orders were replaced with Terrorist Prevention and Investigation Measures (TPIMs). These TPIMs, introduced by the Terrorism Prevention and Investigation Measures Act 2011 were said by the Government to “mark[] a key milestone in the government’s programme to rebalance intrusive security powers and increase safeguards for civil liberties”.<sup>85</sup> Indeed, TPIMs did introduce a less restrictive regime than was applied under Control Orders. For example, people subject to a TPIM were to be provided with a landline, mobile and access to the internet, although broad geographical zones of residence and movement were replaced with tighter geographical

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<sup>85</sup> Home Office, Overview of the Terrorism Prevention and Investigation Measures Act (available at <https://www.gov.uk/government/collections/terrorism-prevention-and-investigation-measures-act>)(accessed 23 February 2018).

limitations and in 2015 the power to require an individual to reside up to 200 miles from their home was introduced, together with weapons bans.<sup>86</sup> Even with these later amendments, however, TPIMs were unquestionably less oppressive and rights-restricting than control orders, and of considerably less rights-based concern than detention under the Anti-Terrorism Crime and Security Act had been. However, they nevertheless continue the principle that restriction on liberty is a desirable and appropriate counter-terrorism measure: a commitment that is fundamentally preventative, and which acts as a form of ‘pre-justice’ measure given that there is no requirement of a crime having been committed (or at least proved) for a TPIM to be imposed. The continuity with the Labour approach, then, is clear.

However, even while the domestic legal provisions for detention without trial appeared to contract, the government increased its focus on excluding suspected terrorists as well as on restricting their freedom of movement, reflecting the concern with people engaging as Foreign Terrorist Fighters. As to exclusion, since 2010 Theresa May has been resolute in her view that the deportation of suspected terrorists is of vital importance and it was the courts’ insistence that this would take place only in compliance with the European Convention on Human Rights that seems to have been the greatest rights-related frustration for her, even leading to her claim that rights-commitments enshrined in the European Convention on Human Rights were endangering national security. Partly reflecting the centrality of deportation with assurances to contemporary counter-terrorism in the UK, David Anderson has noted that “[t]he UK is the country in which the most determined efforts have been made to devise and apply a rights-compliant policy of DWA”,<sup>87</sup> going on to note the efforts of both Labour and Conservative-led governments to develop generic assurances enabling deportation with Jordan, Libya, Lebanon, Algeria, Ethiopia, and Morocco. The numbers of deportations are, in fact, low: surprisingly so, perhaps, by contrast with the amount of political commentary on the importance of the scheme. Anderson reports that a total of 12 people were deported pursuant to these generic assurances between 2011 and July 2017.<sup>88</sup>

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<sup>86</sup> Part 2, Counter-Terrorism and Security Act 2015.

<sup>87</sup> Anderson, above n. 20, [1.3]

<sup>88</sup> Ibid.

The concern with exclusion was not only with the exclusion of foreign terrorist fighters, however, but also with ensuring that British citizens who have travelled abroad for the purpose of engaging with terrorist activity could be excluded. This, of course, was part of the attempt to manage the Foreign Terrorist Fighter phenomenon. In particular, significant powers of exclusion were introduced in the Counter-Terrorism and Security Act 2015, including Temporary Exclusion Orders. These Orders enable the Home Secretary to prevent someone who as a right of abode<sup>89</sup> but is currently outside of the UK,<sup>90</sup> from returning to the UK without a permit<sup>91</sup> (or without having deported<sup>92</sup>). These Orders can be issued where the Home Secretary reasonably suspects that the person in question has been involved in terrorism-related activity outside the state<sup>93</sup> and that protection of the public reasonably necessitates such exclusion,<sup>94</sup> and where either judicial authorisation has been granted<sup>95</sup> or the Home Secretary considers that the urgency of the situation requires an Order to be issued without such authorisation.<sup>96</sup> Although it would appear that this power has been sparingly used since its introduction in 2015,<sup>97</sup> it is controversial not only because of concerns about its compatibility with international and European human rights law, but also because there is a reasonable question as to its effectiveness as a mechanism of countering international terrorism.<sup>98</sup> However, what its introduction shows is a Conservative determination to enshrine in law powers that can be deployed for preventative purposes at home; a clear-eyed focus on preventing *domestic* manifestations of international terrorism. In this, of course, it shares a rationale with measures such as detention without trial introduced by Labour in 2001 and discussed in Part I above. Combined with the power to seize travel documents from persons “suspected of intending to leave Great Britain or the

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<sup>89</sup> s. 2(6), Counter-Terrorism and Security Act 2015.

<sup>90</sup> s. 2(5), Counter-Terrorism and Security Act 2015.,

<sup>91</sup> s. 2(1), Counter-Terrorism and Security Act 2015.,

<sup>92</sup> Ibid.

<sup>93</sup> s. 2(3), Counter-Terrorism and Security Act 2015.,

<sup>94</sup> s. 2(4), Counter-Terrorism and Security Act 2015.

<sup>95</sup> s. 2(7), Counter-Terrorism and Security Act 2015.,

<sup>96</sup> s. 2(8), Counter-Terrorism and Security Act 2015.,

<sup>97</sup> Peter Walker, “Rudd admits ant-terror exclusion powers used only once since 2015”, *The Guardian*, 29 May 2017.

<sup>98</sup> See generally Guy Goodwin-Gill, “‘Temporary Exclusion Orders’ and their Implications for the United Kingdom’s International Legal Obligations, Part I”, *EJIL: Talk!*, 8 December 2014 (available at <https://www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-i/>) and Helen Fenwick, “Terrorism threats and temporary exclusion orders: counter-terrorism rhetoric or reality?” (2017) 3 *European Human Rights Law Review* 247–271.

United Kingdom in connection with terrorism-related activity”, also introduced in 2015,<sup>99</sup> Temporary Exclusion Orders amply demonstrate the government’s approach to Foreign Terrorist Fighters: prevent them from leaving and, if unsuccessful, prevent them from returning and, most of all, prevent them for engaging in terrorism at home as a result of their activities abroad.

As a strategy, the four headline ‘pathways’ of CONTEST have not changed since its inception. There have, however, been slight shifts since the Conservatives took power in 2010, although *Prepare* and *Protect* remain largely the same. Although it did not happen until the Counter-Terrorism and Security Act (CTSA) 2015, the preventative programmes have been translated into statutory duties despite widespread criticism and a lack of evidence that the programmes, such as CHANNEL, work. The imposition of reporting duties on education and universities is widely considered to conflict with free speech.<sup>100</sup> Between 2007 and 2014 80% of referrals to the police-led CHANNEL programme were not found to genuinely be at risk of being drawn into violent extremism.<sup>101</sup> In 2015–2016, only 14% were deemed suitable for the programme and only 5% received specialist support.<sup>102</sup> *Pursue* has moved into utilising immigration powers such as deportation with assurances, passport seizures and exclusion orders outlined above. Lastly, the later incarnations extended special judicial procedures to facilitate the handling of “sensitive and secret material to serve the interests of both justice and national security.”<sup>103</sup> The closure of the courts to open justice principles repeats and confirms the Conservative scepticism about the courts.

Alongside the wide ranging investigatory powers outlined below, the Conservatives set their sights on counter-extremism measures. Having established a *Tackling*

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<sup>99</sup> s. 1(1), Counter-Terrorism and Security Act 2015.

<sup>100</sup> See a letter to *the Guardian* signed by over 150 academics about the indicators, 29<sup>th</sup> September 2016 (available at <https://www.theguardian.com/politics/2016/sep/29/anti-radicalisation-strategy-lacks-evidence-base-in-science>); Steve Hewitt, *The British War on Terror: Terrorism and Counter-Terrorism on the Home Front since 9/11* (2008, London: Continuum) 120; Clive Walker ‘War of words with terrorism: An Assessment of Three Approaches to Pursue and Prevent’ (2017) 22(3) *Conflict and Security Law* 523–551.

<sup>101</sup> National Police Chief Council Referral Figures (available at <http://www.npcc.police.uk/FreedomofInformation/NationalChannelReferralFigures.aspx>)

<sup>102</sup> Home Office, *Individuals referred to and supported through the Prevent Programme*, April 2015 to March 2016, Statistical Bulletin 23/17; Alan Travis, “Only 5% of people referred to Prevent extremism scheme get specialist help”, *The Guardian*, 9<sup>th</sup> November 2017

<sup>103</sup> *CONTEST: The United Kingdom’s Strategy for Countering Terrorism* (Cm 8123, 2011) para 4.2, 45

*Radicalisation and Extremism Taskforce* in 2013,<sup>104</sup> they have made repeated attempts to introduce anti-extremism legislation. Boosted by the 2015 election result, they indicated they would introduce a bill to counter “non-violent” extremism.<sup>105</sup> A further attempt was made in 2016 with a Counter-Extremism and Safeguarding Bill but again a full draft was not published.<sup>106</sup> The content of both was said to be similar, proposing civil measures to ban extremist groups, restrict individuals deemed to be extremist, close associated premises and empower OFCOM to censor extremist content.<sup>107</sup> Both proposals were met with vigorous opposition.<sup>108</sup>

Clearly extremist views continue to be of concern to the Conservatives, with their approach published in a Counter-Extremism Strategy and recently establishing a Counter-Extremism Commission.<sup>109</sup> The Commission has already been the subject of criticism when Sara Khan, who is seen as insufficiently independent, was appointed as its lead.<sup>110</sup> The Conservative’s overall position on anti-extremism is situated in a wider position on ‘British values’ and identity much of which is also bundled up in the Brexit vote and subsequent negotiations. The strategy and attempt to legislate seeks to delineate a position of reasonableness from which intolerant and extreme views can be judged, but lacking evidence and clear argument as to what counts as extreme or how opinion alone leads to violence and terrorism.<sup>111</sup> Ultimately, the Conservatives are engaging in a misguided effort to curtail free speech both on and off-line and alienate particular groups, particularly the Muslim community. As Clive Walker aptly concludes

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<sup>104</sup> *Tackling Extremism in the UK: Report from the Prime Minister’s Task Force on Tackling Radicalisation and Extremism* (2013).

<sup>105</sup> The Queen’s Speech 2015 (27 May 2015).

<sup>106</sup> The Queen’s Speech 2016 (18 May 2016).

<sup>107</sup> David Anderson, *Terrorism Act Report 2015* (available at [https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/09/Terrorism-Acts-Report-2015\\_web-version.pdf](https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/09/Terrorism-Acts-Report-2015_web-version.pdf))

<sup>108</sup> *Ibid* para 9.29, 63-64

<sup>109</sup> HM Government, *Counter-Extremism Strategy* (2015); Home Office, *Factsheet on the Commission for Countering Extremism*, 25 January 2018 (available at <https://homeofficemedia.blog.gov.uk/2018/01/25/factsheet-on-the-commission-for-countering-extremism/>).

<sup>110</sup> Jamie Grierson, “Choice of new UK anti-extremism chief criticised as ‘alarming’”, *The Guardian*, 25 January 2018.

<sup>111</sup> See Joint Committee on Human Rights, *Counter-Extremism Second Report of Session 2016-17*, (HL39, HC105, 22 July 2016), 31.

A more palatable political stance is to recognise that extensive criminal offences against free speech about terrorism, the regulation of such speech activities, and engagement in counter-ideology will not avert all terrorism. As a result, the dismal prospect is that current emanations of violent extremism will indeed take generations to assuage.”<sup>112</sup>

The distinct illiberality in the strengthening the *Prevent* programme and the pursuit of ‘deradicalisation’ is striking given the Government’s initial claim in 2011 that it would seek to “reverse the substantial erosion of civil liberties and roll back state intrusion” and would “introduce safeguards against the misuse of anti-terrorism legislation.”<sup>113</sup> Such safeguards have come in the form of reporting and publishing statistics rather than pulling back from the use of powers.

### *Surveillance*

Alongside movement restrictions, exclusion orders and ‘deradicalisation’, the Conservative government sought extended surveillance powers. As we have seen, the power to retain data was enabled by the EU Data Retention Directive until 2014 when it was found incompatible with the EU Charter.<sup>114</sup> On the heels public enmity over the extent of digital surveillance following the 2013 Snowden revelations,<sup>115</sup> *Digital Rights Ireland* spurred the Conservatives to rush through the Data Retention and Investigatory Powers Act 2014 (DRIPA) to ensure bulk data retention and surveillance powers could continue at least temporarily.<sup>116</sup> Although subject to a sunset clause,<sup>117</sup> the DRIPA’s extension of existing surveillance powers<sup>118</sup>

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<sup>112</sup> Clive Walker “War of words with terrorism: An Assessment of Three Approaches to Pursue and Prevent” (2017) 22(3) *Journal of Conflict and Security Law* 523-551, 551.

<sup>113</sup> Review of Counter Terrorism and Security Powers, Cm 8004 (2011), 4.

<sup>114</sup> *Digital Rights Ireland* above n 73.

<sup>115</sup> Martin Moore ‘RIP RIP? Snowden, Surveillance, and the Inadequacies of our Existing Legal Framework’ (2014) 85(2) *The Political Quarterly* 125-133.

<sup>116</sup> The bill only had 4 days of debate and amendment (the draft was published on 10<sup>th</sup> July 2014 as expedited or fast-tracked legislation and was passed 7<sup>th</sup> July 2014),

<https://services.parliament.uk/bills/2014-15/dataretentionandinvestigatorypowers/stages.html>

<sup>117</sup> DRIPA 2014 s 8(3) meant s 1 to 7 expired on the 31<sup>st</sup> December 2016

<sup>118</sup> Jemima Kiss, “Academics: UK ‘Drip’ data law changes are ‘serious expansion of surveillance’”, *The Guardian*, 15 July 2014.

unsurprisingly invited further challenge in both domestic and EU courts.<sup>119</sup> Undeterred by either legal challenge or public criticism, the Investigatory Powers Act 2016 largely replicated DRIPA provisions and further pursued the CONTEST agenda's strengthening and extending surveillance power.<sup>120</sup>

While governments want to keep pace with technological change, the extension is also the result of the Government's desire to harness the informational power of the big communication and technology companies. The yoking of the internet into everyday life created an evidentiary revolution by facilitating a new surveillance arena. Accordingly, the IPA was presented as regulatory matching technological advances and plugging associated 'capability gaps'.<sup>121</sup> Often referred to as making these powers 'effective',<sup>122</sup> passing these powers quelled government frustration with the supra-national legal rulings which had dented previous efforts to extend investigatory powers.<sup>123</sup> The furore provided an opportunity to surreptitiously broaden surveillance powers to allow collection of bulk data sets,<sup>124</sup> the deployment of 'thematic' warrants<sup>125</sup> and in *Parts 3 and 4* an extended power to gather and retain communications data. Currently under review, the powers in *Part 3* and *4* also broadened which public bodies can collect communications data and for what reasons. In addition to the usual crime prevention and national security, the ten purposes now include public health protection and functions relating to financial stability.<sup>126</sup>

Of the most worrying powers introduced, 'equipment interference' - a statutory euphemism for government sanctioned hacking- outlines one of the key disputes

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<sup>119</sup> *David Davis & Tom Watson and others v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin); Joined Cases *Tele2 Sverige AB v Postoch telestyrelsen* and *SS for the Home Department v Tom Watson et al* above n 119.

<sup>120</sup> See *CONTEST: The United Kingdom's Strategy for Counter-Terrorism* (Cm 8123, 2011) Part 4, 49.

<sup>121</sup> Draft Investigatory Powers Bill (Cm 9152 4 November 2015) (available at <https://www.gov.uk/government/publications/draft-investigatory-powers-bill>)

<sup>122</sup> Examples of the language used in relation to the internet and the need to monitor it Intelligence and Security Committee of Parliament, *Privacy and Security: A modern and transparent legal framework* (2015), 55-6 (available at [http://isc.independent.gov.uk/files/20150312-ISC\\_P+S+Rpt\(web\).pdf](http://isc.independent.gov.uk/files/20150312-ISC_P+S+Rpt(web).pdf)), particularly at 9-13

<sup>123</sup> *Digital Rights Ireland* above n 73; Joined Cases *Tele2 Sverige AB v Postoch telestyrelsen* and *SS for the Home Department v Tom Watson et al* above n 119.

<sup>124</sup> IPA 2016 Parts 6 and 7

<sup>125</sup> IPA 2016 Part 2, s17

<sup>126</sup> IPA 2016 Part 3 s 61(2)

about the Government's approach to surveillance.<sup>127</sup> On the one hand, legislative acknowledgment of government hacking is a step towards transparency<sup>128</sup>; on the other, legislation legitimises its use.<sup>129</sup> Through EI the security and intelligence agencies can access (or interfere with) any data producing electronic, enabling intelligence and security agencies to circumvent encryption, if they can break it, by issuing a "capability notice" to the provider.<sup>130</sup> As with the earlier regulations, the use of intercept evidence continues to be excluded,<sup>131</sup> except in pretty much all counter-terrorism related proceedings, such as the Investigatory Powers Tribunal, SIAC, the Proscribed Organisation Appeal Commission and in relation to TPIM proceedings, Temporary Exclusion Orders and in closed material procedures.<sup>132</sup> The decision to replicate the ban followed a further review of its use undertaken again by Sir John Chilcot. In his 2014 review he argued that the ban could be overturned but only if the evidence were disclosed to the defendants but doing so would be cost prohibitive.<sup>133</sup>

*Part 2*, covering 'targeted interception', updates the RIPA provisions on access to communications content and, while it requires adherence to individualised and evidenced suspicion,<sup>134</sup> can be issued for a wide range of reasons. The section also provides measures to enable 'Thematic warrants' allowing groups of individuals to be targeted<sup>135</sup> where they share 'a common purpose or... carry on, or may carry on, a particular activity'.<sup>136</sup> Since the size of the group is undefined and there is no

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<sup>127</sup> IPA 2016 Part 5

<sup>128</sup> David Anderson, 'The Investigatory Powers Act 2016 – an exercise in democracy' (available at <https://www.daqc.co.uk/2016/12/03/the-investigatory-powers-act-2016-an-exercise-in-democracy/>)

<sup>129</sup> Lorna Woods, 'United Kingdom · The Investigatory Powers Act 2016' (2017) 3(1) *European Data Protection Law Review* 103– 105

<sup>130</sup> Thomas Fox-Brewster, "Forget About Backdoors, This Is The Data WhatsApp Actually Hands To Cops" *Forbes*, 22<sup>nd</sup> January 2017; The debate was clearly of concern to the tech industry, TechUK, "Further techUK Briefing on the Investigatory Powers Bill" (September 2016) (available at [https://www.techuk.org/images/techUK\\_HoL\\_IP\\_Bill\\_Briefing\\_September\\_2016.pdf](https://www.techuk.org/images/techUK_HoL_IP_Bill_Briefing_September_2016.pdf))

<sup>131</sup> s 56 IPA 2016, exceptions outlined in Sch. 3

<sup>132</sup> S 4, Sch 3 IPA 2016

<sup>133</sup> HM Government, *Intercept as Evidence*, (Cm 8989, 2014)

<sup>134</sup> *Zakharov v Russia* [GC] ECtHR 2015 47143/06 [119]; M.H. Murphy 'Algorithmic surveillance: the collection conundrum' (2017) 31(2) *International Review of Law, Computers & Technology* (Special Issue: Justice in Algorithmic Robes) 225–242; C. Nyst and T. Falchetta 'The Right to Privacy in the Digital Age' (2017) 9(1) *Journal Human Rights Practice* 104–118.

<sup>135</sup> Part 2, s17

<sup>136</sup> Part 2, s17(2)(a)



restriction on targeting a religious group, from the perspective of profiling,<sup>137</sup> it is possible that a legislative basis for ‘suspect communities’ has been created.<sup>138</sup>

The ability to target undefined groups is accompanied by *Part 6* and *7* powers to access bulk data. *Part 6* allows access to content as well as metadata of those outside the UK and while it is subject to the ‘double lock’ detailed below, the foreign focus restriction is a minimal safeguard as UK citizens are easily captured when they interact with anyone, business or individual, overseas.<sup>139</sup> The provisions in *Part 7* relating to Bulk Personal Data sets (BPDs) of UK residents (personal data relating to a large number of people, such as the electoral roll, telephone directories, airline passenger manifests) are highly intrusive, as the Intelligence and Security Committee (ISC) noted: they concern ‘a wide range of individuals, the majority of whom are unlikely to be of intelligence interest.’<sup>140</sup> It is for these reasons that enabling bulk data acquisition garnered the most controversy and critical commentary during the passage of the Bill.<sup>141</sup> These debates tended to focus on threats to press freedom but bulk powers pose a more pervasive threat to freedom in general.<sup>142</sup> The recommendation of the ISC, the committee best-informed on

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<sup>137</sup> Part 3 s 61(7)

<sup>138</sup> Patrick Hillyard, *Suspect Communities* (1993, London; Pluto); Mary Hickman, Lyn Thomas, Sara Silvestri & Henri Nickels, ‘Social cohesion and the notion of ‘suspect communities’ (2012) 5(1) *Critical Studies on Terrorism* 89–106.

<sup>139</sup> IPA 2016 Part 6 s136(2)

<sup>140</sup> Intelligence and Security Committee of Parliament, *Privacy and Security: A modern and transparent legal framework* (HC 1075, 2015)

<sup>141</sup> *Liberty & Others v FCO (the Security Service, SIS, GCHQ)* [2015] UKIPTrib 13\_77-H; the system has been subject the three reviews: David Anderson, Independent Reviewer of Terrorism Legislation, *A Question Of Trust: Report Of The Investigatory Powers Review* (2015) (available at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>); Intelligence and Security Committee of Parliament, *Privacy and Security: A modern and transparent legal framework* (HC 1075, 2015); Royal United Services Institute, *A Democratic Licence to Operate: Report of the Independent Surveillance Review* (2015) (available at [https://rusi.org/sites/default/files/20150714\\_whr\\_2-15\\_a\\_democratic\\_licence\\_to\\_operate.pdf](https://rusi.org/sites/default/files/20150714_whr_2-15_a_democratic_licence_to_operate.pdf))

<sup>142</sup> Martin Moore ‘RIP RIPA? Snowden, Surveillance, and the Inadequacies of our Existing Legal Framework’ (2014) 85(2) *The Political Quarterly* 125–133, 126; Matt Burgess, “Facebook, Google, Twitter unite to attack ‘snoopers’ charter” *The Wired*, 7 January 2016 (available at <http://www.wired.co.uk/article/facebook-google-twitter-investigatory-powers-bill>); Liberty, “No #NoSnoopersCharter”, (available at <https://liberty.e-activist.com/ea-action/action?ea.client.id=1826&ea.campaign.id=44061>); Mike Harris, “The Queen’s Speech was most illiberal for a generation” *The Independent*, 18 May 2016,

surveillance power use, recommended that the power to collect class Bulk Personal Data sets be removed, went unheeded.<sup>143</sup>

The Conservatives have not been entirely successful in their attempt to gain wide bulk surveillance powers as the legal challenges to the IPA precursor, DRIPA, reign in draconian data retention. Initially the High Court found DRIPA incompatible with EU law. Key points were subsequently referred to the CJEU which, in a combined case, ruled that to be compatible with EU law data access and retention had to conform to the *Watson* requirements: it must be restricted to the purpose of fighting serious crime (which DRIPA and the IPA are not), be subject to the prior approval of a court or other independent body and ensure that the data is not to be transferred outside the EU.<sup>144</sup> In applying this judgment to DRIPA, the Court of Appeal recently ruled that this meant DRIPA 2014 was incompatible with EU law on all three points. Without amendment *Parts 3 and 4* of the IPA 2016 are therefore also incompatible, although in response to *Watson* changes have been tabled.<sup>145</sup> A further judicial review of bulk surveillance powers is being heard at the courts presently.<sup>146</sup>

In relation to governmental approaches to counter terrorism, the disputes over surveillance powers often appear to be happening on two separate plains. Tom Watson MP, the campaign group *Liberty*, and others who are focused on civil liberties and human rights (more on this below) are anxious about government surveillance in general regardless of the extent or adequacy of oversight.<sup>147</sup> In this

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<sup>143</sup> Intelligence and Security Committee of Parliament, *Report on the draft Investigatory Powers Bill* (2016) (Recommendation F); *Report of the Joint Committee on the Draft Investigatory Powers Bill*, (Recommendation 42).

<sup>144</sup> Joined Cases *Tele2 Sverige AB v Postoch telestyrelsen* and *SS for the Home Department v Tom Watson et al* above n 119, para 9.

<sup>145</sup> HM Government, Draft Statutory Instrument The Data Retention and Acquisition Regulations 2018, (available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/663677/November\\_2017\\_IPA\\_Consultation\\_-\\_Draft\\_regulations\\_amending\\_the\\_IP\\_Act.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/663677/November_2017_IPA_Consultation_-_Draft_regulations_amending_the_IP_Act.pdf))

<sup>146</sup> CO/1052/2017 R (*on the application of National Council For Civil Liberties (Liberty) v Secretary Of State For The Home Department*) is scheduled for the 27<sup>th</sup> and 28<sup>th</sup> February 2018; See Liberty, *The People vs The Snooper's Charter*, (available at <https://www.liberty-human-rights.org.uk/campaigning/people-vs-snoopers-charter>)

<sup>147</sup> Domestically Angela Patrick, 'Who sees you when you're sleeping? Who knows when you're awake?' (2016) UKHumanRights Blog (available at <https://ukhumanrightsblog.com/2016/12/21/who-sees-you-when-youre-sleeping-who-knows->

they are broadly supported by the EU court, whereas the Government and their supporters who are focused on security believe broad surveillance is valuable and any discomfort at the extent of the power can be ameliorated by augmenting the available safeguards and oversight, i.e. by the proceduralisation of rights protections on which we expand further below.

### *Human Rights Scepticism*

Like the Labour governments that preceded them, Conservative-led and Conservative governments since 2010 have found themselves occasionally frustrated with human rights law. We have already seen that both deportation with assurances and data surveillance have at times fallen foul of human rights law—particularly the Human Rights Act 1998 and the European Convention on Human Rights—in both domestic and supranational courts. In spite of Theresa May’s championing of proportionate, rights-respecting counter-terrorism in the 2011 *Review* discussed above, it has become apparent that there are clear disagreements between her (and much of Parliament) and many courts as to what constitutes proportionate, rights-respecting counter-terrorism. In essence this is a conflict about who should decide: it is becoming increasingly clear that many in the Conservative Party consider that decisions about rights-compliance should be domestic rather than supranational, and political rather than judicial. As Frances Webber has put it, “the current Conservative government is changing the meaning of accountability. It is increasingly treating compliance with international legal norms and human rights as optional.”<sup>148</sup> Of course, this is part of a broader working out of contemporary constitutional tensions that have persisted since long before the 2011 attacks and which are fundamentally focused on questions of constitutional design and authority.

These tensions are not particularly a matter for counter-terrorism, but the extent to which the counter-terrorism context has been used as a *milieu* in which to work out these tensions is notable. This is illustrated by the Prime Minister’s continuing concern that restrictions on deportation with assurances undermine national security in the United Kingdom. Whether that is manifested in her claim, during the

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[when-youre-awake/](#)); internationally Neil M. Richards ‘The Dangers of Surveillance’ (2015) 126(1934) *Harvard Law Review* 1934–1965.

<sup>148</sup> Frances Webber, ‘The inversion of accountability’ (2016) 58(2) *Race & Class* 55–63.

Brexit Referendum, that it was the European Convention on Human Rights rather than the European Union that the UK ought to be leaving because the Convention “can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals”,<sup>149</sup> or her pledge that “we will never again – in any future conflict – let those activist, left-wing human rights lawyers harangue and harass the bravest of the brave – the men and women of Britain’s Armed Forces”<sup>150</sup> through rights-based litigation for conflict-related abuses, the Prime Minister’s hostility to international human rights supervision has become clear and been clearly lodged in security-related narrative. In this, she is hardly alone within her own party, and neither is she indicating clean break from the rhetoric of the Labour governments that preceded her. Recall that one of Blair’s earliest rights-related interventions following the 11 September 2001 attacks was to call into question the continuation of the *Chahal* doctrine—the very doctrine that is at the heart of restrictions on deportations with assurances so criticised by the Prime Minister—and that it was the Labour governments who pursued the early attempt to prevent extra-territorial application of the ECHR in Iraq, which has now developed into the proposition from the Conservative government of derogating from the ECHR in all future military operations abroad. While the Conservative rhetoric on the Convention and the appropriateness of applying human rights to restrict counter-terrorism might take on a firmer tone, it is contiguous with that which preceded it, indicating a further point of continuity.

So too can continuity be observed in the approach to enhancing human rights compliance in counter-terrorism law. In the main the policy objective to be pursued is not varied when its tension with human rights law is ascertained, rather the operation of the powers is proceduralised. Procedure and procedural protections thus replace substantive rights-protections: the intrusion onto substantive rights nevertheless takes place. This is an extension of the logic that underpins, for example, the Special Advocates system that we have already seen the Labour Government adopted in respect of suspected terrorists, and can be widely observed in the post-2010 Conservative governments’ measures. As already noted, for example, Temporary Exclusion Orders ordinarily require judicial supervision, unless

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<sup>149</sup> Theresa May, “The UK, EU and our Place in the World”, Institute of Mechanical Engineers, (25 April 2016) (available at <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world> )

<sup>150</sup> Theresa May, *Conference Speech*, Conservative Party Conference Birmingham, 5 October 2016.

such an Order is urgently required. So too can such proceduralisation be observed in the context of surveillance, where introducing ‘safeguards’ was fundamental to the passage of new laws.

The IPA safeguards are summarised in the Act’s prime real estate, *Part 1* but detailed in *Part 8*, and procedural compliance is not merely best practice but one of civil and, for the worst failures, criminal liability. Attempts to circumvent these procedures by relying on the broader powers of the Intelligence Services Act, for example, are supposedly precluded.<sup>151</sup> However, safeguarding bells and whistles are undercut because ‘these provisions are not overarching but apply to specified activities’.<sup>152</sup> Significantly, circumvention protections do not apply to equipment hacking or communications data. The attempt then to ‘improve’ and increase oversight is superficial as *Part 8* only consolidates existing oversight bodies into a new Investigatory Powers Commissioner.<sup>153</sup> The two-step ‘double-lock’ mechanism whereby both the relevant minister and a Commissioner approve warrants before they become effectual is not as comprehensive as implied.<sup>154</sup> In urgent cases, and most cases would likely find the urgency requirement an insignificant hurdle, the Judicial Commissioner can review the warrant up to 3 working days after issue.<sup>155</sup> This means that a warrant is not a judicial door that must be unlocked, but simply takes the form of *retrospective* judicial supervision. While more extensive supervision is clearly overdue, the measure presented here is disappointingly feeble,<sup>156</sup> not least because Judicial Commissioners are not ‘courts’ or even ‘judges’ in this context (although they must be former or serving members of the Judiciary), but rather a separate category of quasi-judicial oversight appointed and regulated by the IPA 2016.

### **Part III. A CONSERVATIVE COUNTER-TERRORISM?**

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<sup>151</sup> s. 81, IPA 2016.

<sup>152</sup> Lorna Woods ‘The Investigatory Powers Act 2016’ (2017) 1(2) *Journal of Data Protection and Privacy* 222-232

<sup>153</sup> s. 227, Part 8, IPA 2016.

<sup>154</sup> s. 19 and 23, IPA 2016.

<sup>155</sup> s. 24(3), Part 2, IPA 2016.

<sup>156</sup> Ales Zavrsnik, ‘Blurring the Line between Law Enforcement and Intelligence: Sharpening the Gaze of Surveillance?’ (2013) 9(1) *Journal of Contemporary European Research* 181-202, 186.

While there is plenty to be concerned about from a human rights perspective in the post-2010 counter-terrorism law and policy pursued by the Conservative and Conservative-led governments, in the main this law and policy continues trends and foci that were evidence in the New Labour approach to counter-terrorism from 1997 and particularly since 2001. This is not to say, however, that the underpinnings of these approaches are the same.

The Conservatives' approach to counter-terrorism will inevitably have been shaped by their pragmatic and reactionary world view, evident across all three periods of Conservative Party activity and ideological development in the late 20<sup>th</sup> and early 21<sup>st</sup> Century: the return to a Disraelian 'one nationism' following Thatcher's neo-liberalism,<sup>157</sup> Cameron's austerity-laced 'big society' progressive neo-liberalism (i.e. a modernising Gladstonian Liberalism),<sup>158</sup> and finally May's social "meritocratic" conservatism, which Adrian Pabst argues represents a new 'postliberal' position,<sup>159</sup> albeit being distracted from by negotiations with the EU. Across all of these stages, there has been little change to the Conservative Party's approach to counter-terrorism, which in turn has attracted a degree of bipartisan agreement reminiscent of the post-war consensus.<sup>160</sup>

Such continuity is partly predictable. For conservative thinkers, a c/Conservative 'ideology' would be partly antithetical to its core values. Conservatives are inevitably anti-ideological precisely because they are anti-idealist. They are wary of utopian pursuits forsaking all existing structures and defensive of social and political traditions. Much of modern conservatism takes its lead from Edmund Burke who argued that revolutionaries and idealists invert the relationship between practice and

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<sup>157</sup> David Willets, 'Modern Conservatism' (1992) 63(4) *The Political Quarterly* 413-421; Stephen Evans 'The Not So Odd Couple: Margaret Thatcher and One Nation Conservatism', (2009) 23(1) *Contemporary British History* 101-121

<sup>158</sup> Timothy Heppell 'Cameron and liberal conservatism: Attitudes within the parliamentary conservative party and conservative ministers' (2013) 153 *British Journal of Politics and International Relations* 340-361; Steve Howell, 'The Conservatives and Local Government: Reform, Localism and the Big Society since 1888' Hart and Carr (eds) *The Foundations of the British Conservative party*, (2013, London; Bloomsbury Academic), 133-152.

<sup>159</sup> Adrian Pabst, 'Postliberalism: The New centre Ground of British Politics' (2017) 88(3) *The Political Quarterly* 500-509; Ben Williams, 'Theresa May's Premiership: Continuity or Change?' (2017) *Political Insight* 10-13.

<sup>160</sup> David Dutton, *British Politics Since 1945: The Rise, Fall and Rebirth of Consensus*, 2nd ed. London; Blackwell 1997); Dennis Kavanagh 'The Postwar Consensus' (1992) 3(2) *Twentieth Century British History* 175-190.

theory. For Burke, theory should not guide practice, but practice develop theory. He explained

to take the theories which learned and speculative men have made from that government, and then, supposing it made on those theories which were made from it, to accuse that government as not corresponding with them.<sup>161</sup>

Accordingly, the ‘continuity’ between New Labour and post-2010 Conservative-led and Conservative approaches to counter-terrorism connects with the belief in maintaining the status quo and a preference for reflecting on existing customs rather than theorising new approaches that have not been tested. Scruton explains this as an inability “to appeal to any future that is not already present and past”.<sup>162</sup> This approach reflects the Burkean roots of modern conservative thought which developed as a “defence of tradition against the calls for popular sovereignty”.<sup>163</sup> It is also a reaction against the privileging of rights over authority. Individual liberty, conceived of either as rights or as civil liberties, is not, in the Conservative viewpoint, absolute but subject to established government authority which maintains political customs and institutions that presuppose “general connivance.”<sup>164</sup> In other words, obedience to national authority which is undermined by having a set of rights enshrined at supra-national level and restricting the Government’s ability to apply its authority in certain areas such as deportation and passport seizure.

Of course, obedience and control could sit at odds with free market ideas and the development of New Right neo-conservatism. But this perspective can be explained by Conservatives’ scepticism of rationalist principles that generate from abstract constructions of the world.<sup>165</sup> Michael Oakeshott explained that a plan to “resist all planning may be better than its opposite” but it is nonetheless part and parcel of the same attempt to construct a “self-conscious ideology” that Conservative thinkers would rather avoid.<sup>166</sup> It is, therefore, quite consistent and perhaps expected for

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<sup>161</sup> Edmund Burke, ‘1782 House of Commons motion’ *The Works of the Right Hon. Edmund Burke*, II (1834, London; Holdsworth), 488.

<sup>162</sup> Roger Scruton, *The Meaning of Conservatism* (1980, London; Macmillan), 27.

<sup>163</sup> Roger Scruton, *Conservatism: Ideas in Profile* (2017, London; Profile), 121.

<sup>164</sup> Roger Scruton, *The Meaning of Conservatism* above n 162, p. 23, 180.

<sup>165</sup> Michael Oakeshott, ‘Rationalism in Politics’ [1962], *Rationalism in Politics and Other essays*, (1991, Indianapolis; Liberty Fund), 5-42.

<sup>166</sup> *Ibid*, 212

conservatism to have maintained a commitment to the three basic themes of post-1997 counter-terrorism identified in Part I of this paper (prevention, surveillance, and human rights exceptionalism) even while purporting to enhance liberty in the face of disproportionate counter-terrorism laws and policies and particularly to be expected that, in doing it, Conservatives would tend towards seeing national authorities as those that should determine the question of proportionality.

Scepticism over rights in the counter-terrorism context appears to play out somewhat more easily for Conservatives than it did for New Labour. The revolutionary zeal of the Blair government for constitutional reform was evident right from the beginning of its term in 1997, and such reform was dramatic: the Human Rights Act 1998 and the establishment of the UK Supreme Court, together with substantial devolution to Scotland, Northern Ireland and Wales transformed the UK constitutional landscape.<sup>167</sup> In this context, one might perhaps have expected a departure from rights-repression in the context of counter-terrorism, but no such departure was in evidence. While the Labour government ‘normalised’<sup>168</sup> counter-terrorism powers through the Terrorism Act 2000 we have already seen that it did so in a manner that was heavily oriented towards prevention and that tended to embed, rather than question, the rights-limiting approach to counter-terrorism that had been evident in the law as it applied to Northern Ireland. Furthermore, this approach was congruent with the broader Labour move to use quasi-criminal instruments and early or remote criminalisation as a means of addressing difficult public order issues, from anti-social behavior to terrorism-related activity.<sup>169</sup>

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<sup>167</sup> Part 3 of the Constitutional Reform Act 2005; the Scotland Act 1998; the Northern Ireland Act 1998; and the Government of Wales Act 1998 (effectively superseded by the Government of Wales Act 2006)

<sup>168</sup> On ‘normalisation’ of emergency counter-terrorism measures generally see, e.g., Oren Gross and Fionnuala ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2002, Cambridge; Cambridge University Press), Chapter 1.

<sup>169</sup> For analysis of this trend see Lucia Zedner, “Preventive Justice or Pre-Punishment? The Case of Control Orders” (2007) 60(1) *Current Legal Problems* 174–203; Lucia Zedner, “Pre-crime and pre-punishment: a health warning” (2010) 81(1) *Criminal Justice Matters* 24–25; Lucia Zedner, “Fixing the Future? The pre-emptive turn in criminal justice” in Bernadette McSherry et. al., *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (2009, Oxford; Hart Publishing) 35–58.



Labour was, of course, making decisions in the immediate aftermath of the 9/11 attacks and, subsequently, the attacks on central London in July 2005. There can be little doubt that the convergence of popular and elite demands for responses, security and power that follows attacks will have had an impact on the Blair government;<sup>170</sup> indeed, this was clear from the Prime Minister's frequent references to what police and security forces 'needed' to ensure security when proposing repressive measures such as extended detention without charge.<sup>171</sup> The government may well have reasonably expected that such measures would be greeted with high levels of deference by the courts, accustomed as we are to courts conceding to the greater authority of the political branches in the context of security crises. However, while there were certainly some examples of deference (at national and European level), courts were perhaps surprisingly non-deferential towards the state in counter-terrorism contexts, pushing back against key powers, often by relying on the provisions of the Human Rights Act 1998.<sup>172</sup> Scepticism towards the courts in the counter-terrorist context consequently developed among many in Labour. This should not, however, be considered overly surprising: like Conservatives, the Left has long been sceptical of courts, but for different reasons. For the Left, courts are often viewed with suspicion, characterised as the preserve of the elite.<sup>173</sup> Even if, as Ewing has argued, the apparent non-deference of the courts did little, in real terms, to help people who were at the end of the sharpness of counter-terrorism law,<sup>174</sup> it certainly disrupted some of the Labour government's approach to counter-terrorism, laying conditions for security-related courts-scepticism that, while often different in ideological source from those Conservatives, created a further point of bipartisan consensus on the governance of counter-terrorism.

Does this mean that there is nothing that we can discern or characterise as a Conservative counter-terrorism? Partially. Certainly, the rationales that underpin post-2010 approaches to counter-terrorism do seem to have a Conservative particularity. The construction of prevention as a duty of the state rather than an

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<sup>170</sup> See Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (2011, Cambridge; Cambridge University Press), Chapter 1.

<sup>171</sup> *Ibid.*, 109 *et seq.*

<sup>172</sup> For a general analysis see de Londras, *Detention in the 'War on Terror'*, above n 170.

<sup>173</sup> See generally Tom Campbell, Keith Ewing, Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (2011, Oxford; Oxford University Press).

<sup>174</sup> K.D. Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (2010, Oxford; Oxford University Press).

approach to government reflects a Conservative commitment to paternalistic statehood undertaken for the good of the populace. As David Willets said as a young MP, Conservatives would rather “trust in community, with its appeals to deference, to convention and to authority”<sup>175</sup> than in law, rights, or courts. For many Conservatives, this simply reflects a belief in what Omand has called “securitas”:<sup>176</sup> the public value of security in which protecting the state is co-extensive with individual rights rather than justified by them.

Anticipatory approaches appeal to the sense of a community that needs to be protected from harm, even if sometimes that itself produces harm. While this may seem to chime obviously with Thatcherite and Mayist approaches to neo-liberal thinking, it is just as true for Cameron’s apparent progressivism. He insisted that rather than trying to “turn the clock back”, Conservatives wanted to know “what has been done which is good and we can build on”.<sup>177</sup> Cameron repeated the language of looking backwards and deferring to convention, not presenting a radical agenda. Progressivism may have appeared to be a “significant change of direction” and a “rediscovery of progress as social justice”<sup>178</sup> but this was largely rhetorical; ‘progressive’ Conservative actions mark them as only pursuing social justice as “part of a change of image, not substantively of policy or ideology”.<sup>179</sup> This is as evident in counter-terrorism as in any other field of activity.

The rebranding of control orders into TPIMs, the maintenance of the broad shape of CONTEST, and the extension of surveillance, while continuing a New Labour policy, is not the result of a revelatory moment for Conservative thinking. May’s overall Conservative agenda, dropping some of the language of progression found in Cameron’s approach, embodies a more traditional social stance. The counter-terrorism agenda renewed its focus on counter-extremism with the introduction of the Counter Extremism Strategy and much criticised Counter Extremism Bill.

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<sup>175</sup> David Willets, ‘Modern Conservatism’ (1992) 63(4) *The Political Quarterly* 413–421, S224

<sup>176</sup> David Omand, *Securing the State* (2010, London; Hurst), 285

<sup>177</sup> Andrew Rawnsley, ‘The Cameron Interview’ *The Observer*, 18 December 2005. See also Tim Bale, *The Conservative Party from Thatcher to Cameron*, (2013, Cambridge; Polity), 287.

<sup>178</sup> Simon Griffiths, ‘What was Progressive in “Progressive Conservatism”?’ (2014) 12(31) *Political Studies Review* 29–40; see also Timothy Heppell, ‘Cameron and liberal conservatism: Attitudes within the parliamentary conservative party and conservative ministers’ (2013) 153 *British Journal of Politics and International Relations* 340–361.

<sup>179</sup> Griffiths, *ibid.*

These measures illuminate how Conservatism “in its most recent attempt to define itself, has become the champion of Western civilisation against its enemies...political correctness...and religious extremism, especially militant Islamism.”<sup>180</sup> In so doing, it is fulfilling a key Tory value as a defending, or rather conserving “the political arrangements that have historically shown themselves to be conducive to good lives”.<sup>181</sup>

## Conclusion

The intrusion on rights that emerges from counter-terrorism has long been clear, and remains a cause for concern. As the nature of terrorist activities continues to shift over time, focusing more and more in Europe on so-called ‘lone wolf’ and low-tech attacks and on online engagement for organisation and radicalisation, we can expect the legal and policy frameworks that are applied to counter terrorism also to adapt. It is difficult to see, based on the patterns already outlined, if and how a dissensus in approach might emerge that would fundamentally challenge commitment to the three core planks of prevention, surveillance and rights scepticism that pervade UK counter-terrorism even if—as does sometimes happen—there are sometimes disagreements on the edges about, for example, nature and frequency of oversight.

This has led to a notable continuity across decades and governments; a continuity that can be explained in Conservative thought only if, as Kekes says, the system has historically been conducive to good lives in the counter-terrorism context. However, we cannot say with any certainty that this is the case, particularly given the readiness of some government units to accept a history of failing to anticipate risk. The Office of Security and Counter-Terrorism, supplying evidence to the Intelligence and Security Committee of Parliament, conceded “we did fail to look ahead far enough and we did fail to see the rise of ISIL”, and this after “failing to see the rise of Al-Qaeda.”<sup>182</sup> Continuity in the fact of this might be explained by a

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<sup>180</sup> Roger Scruton, *Conservatism: Ideas in Profile* above n 163, 121.

<sup>181</sup> John Kekes, *A Case for Conservatism*, (1998, Itacha, NY; Cornell), 2.

<sup>182</sup> Intelligence and Security Committee of Parliament, *Annual Report 2016-2017*, para 63

Conservative acceptance of imperfectionism,<sup>183</sup> but it may also reflect an unwillingness to look for counter-terrorism methods that do not purloin rights or undo open justice. That latter characteristic is, we argue, shared across Labour and Conservative governments of the past twenty years.

This leaves one then to wonder what the future of counter-terrorism in the UK might be. There is no indication that prevention, surveillance, and human rights exceptionalism might be shifted from their central location within the counter-terrorist context. In *For the Many, Not the Few* Corbyn's Labour pledged to "always provide our security agencies with the resources and the powers they need to protect our country and keep us all safe" while "ensur[ing] that such powers do not weaken our individual rights or civil liberties";<sup>184</sup> to engage in investigatory powers that are "both proportionate and necessary"<sup>185</sup> and to "reintroduce effective judicial oversight over how and when they are used".<sup>186</sup> While *Prevent* would be reviewed "with a view to assessing both its effectiveness and its potential to alienate minority communities", it was not to be abandoned; indeed, a Labour government would "address the government's failure to take any effective new measures against a growing problem of extreme or violent radicalisation".<sup>187</sup> While Labour's vision accepts the ability of its counter-terrorist measures to isolate, the distance from the Conservative perspective is not that great. The Conservatives' *Forward Together* pledged more funding for counter-terrorism and security,<sup>188</sup> new criminal offences and aggravated offences to tackle extremism (singling out "Islamist extremism" in particular),<sup>189</sup> and to establish the Commission for Countering Extremism, which they did in January 2018.

Unfortunately, nothing in this suggests a change of direction, not to mention the radical rupturing of the current counter-terrorist consensus and embrace of a dispositional shift towards security, risk, and rights that would be needed effectively to break the counter-terrorism consensus and continuity in approach outlined here.

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<sup>183</sup> See for example, Milton Friedman's *Justification, Capitalism and Freedom*, (1966, Chicago; Chicago University Press), 22-36.

<sup>184</sup> Labour Party, *For the Many, Not the Few*, General Election 2017 Manifesto, 77.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Conservative Party, *Forward Together*, General Election 2017 Manifesto, 44.

<sup>189</sup> Ibid, 55.